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SUPERIOR COURT  
2009 NOV -9 PM 2: 06  
JEANNE THICKS, CLERK  
BY: N. Seguin

IN THE SUPERIOR COURT OF STATE OF ARIZONA

IN AND FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA,

Plaintiff,

v.

STEVEN CARROLL DEMOCKER,

Defendant.

Cause No. P1300CR20081339

Division 6

STATE'S RESPONSE TO DEFENDANT'S  
MOTION TO SUPPRESS EVIDENCE  
AND REQUEST FOR FRANKS HEARING

The State of Arizona, by and through Sheila Sullivan Polk, Yavapai County Attorney, and her deputy undersigned, hereby submits its Response to Defendant's Motion to Suppress Evidence and Request for Franks Hearing and requests that Defendant's Motion be denied, specifically Defendant's request for a *Franks* Hearing. Defendant had failed to show, by preponderance of evidence, that the Affidavit for Search Warrant contained any deliberate falsehoods or reckless disregard for the truth. The State of Arizona's Response is supported by the following Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

FACTS:

1. At approximately 7:25 the morning of July 3, 2008, Judge Arthur Markham signed a search warrant authorizing the Yavapai County Sheriff's Office to search the following:

- a. The home of the victim, Virginia Carol Kennedy, located at 7485 Bridal Path in the Williamson Valley area north of Prescott (including a secondary residence or guest house located on the property and all vehicles on the property);
- b. The home of Defendant located at 1716 Alpine Meadows, #1405, in Hassayampa Village in Prescott;
- c. Defendant's business office located at 1560 Plaza West Drive in Prescott; and
- d. Defendant's gray 2007 BMW bearing Arizona license plate 693XNM.

The affidavit for the search warrant included the following facts as known at that time:

2. At approximately 8:14 p.m. July 2, 2008, Carol's mother, Ruth Kennedy, contacted the Yavapai County Sheriff's Office to request a welfare check on Carol. According to the Affidavit, Carol and her mother had been talking on the phone when Carol suddenly screamed, "Oh no." and dropped the phone.<sup>1</sup> The call was disconnected and repeated attempts to reach Carol were unsuccessful.

3. At approximately 8:52 p.m. on July 2, 2008, Carol Kennedy was found dead, the victim of multiple severe blows to her head.

4. The scene was in disarray with cabinets and shelves on the floor. A blood drop was found on the sidewalk just outside the exterior door of the room where Carol was discovered.

5. When the deputies canvassed the area, they found what appeared to be fresh bicycle tracks on a trail behind the victim's home.

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<sup>1</sup> The transcript of the 911 call demonstrates that Ruth Kennedy told dispatch that Carol screamed "Oh no." Ms. Kennedy later stated that Carol did not scream but said "Oh no" as though she were irritated, as in "Oh no, not again."

1 6. The deputies learned that Carol had been involved in a lengthy divorce from Defendant  
2 and that the divorce had been finalized in May of 2008. It was reported that the decree ordered  
3 Defendant to turn over his 401K valued at \$190,000.00 to Carol.

4 7. Interviews were conducted with Defendant, his and Carol's daughter, Charlotte, and  
5 Charlotte's boyfriend, Jacob Janusek. Charlotte and Jacob stated that Defendant had left the  
6 Alpine Meadows home at about 4:00 p.m. that afternoon in his vehicle to go for a bike ride on  
7 the Hassayampa Trail. They said Defendant did not return until nearly 10:00 p.m.

8 8. Charlotte and Jacob said Defendant immediately showered when he arrived home and  
9 everyone sat down to eat around 11:00 p.m. They said Defendant ate very little which they felt  
10 was unusual.

11 9. Charlotte was asked about the possibility that Defendant had gone to the Williamson  
12 Valley area. Charlotte stated that Defendant did not go out there since the divorce.

13 10. Charlotte stated it was unusual for her father to be out of touch for that length of time.  
14 Charlotte stated that she became concerned and had tried to text message him but that she  
15 never got a response.

16 11. Defendant stated he went for a bike ride in the Williamson Valley area at about 6:00  
17 p.m. Defendant stated he parked his vehicle off of Love Lane (Love Lane is on the west side  
18 of Williamson Valley Road and just a short distance from Carol's home) and that the trail he  
19 was on eventually connected to the Williamson Valley Trailhead. Defendant stated that one of  
20 his tires went flat and, as a result, it took him approximately 2 hours to get back to his vehicle.

21 12. Defendant stated he got home about 10:00 p.m., took a shower, washed the clothes he  
22 was wearing, and sat down for dinner with Charlotte and Jacob. Defendant stated his clothes  
23 were still in the washer.

1 13. Defendant stated that sometime after he showered he told Charlotte and Jacob he was  
2 concerned about Carol because her family had called him at least twice to tell him they could  
3 not reach her after an abrupt end to a phone call with her.

4 14. Defendant stated that after he ate he remembered that he had left his computer at work  
5 on and went to the office located at 1560 West Plaza Drive in Prescott to turn it off.

6 15. Defendant had numerous scratches and abrasions to the left side of his arms and legs  
7 that appeared to be recent. Defendant claimed he was scratched while riding his bike.

8 16. Detectives went to location off Love Lane where Defendant claimed to have parked his  
9 car. They were unable to find any bicycle tracks and there were no vehicle tire impressions  
10 similar to the tires on Defendant's vehicle.

11 17. The search warrant authorized seizure of numerous items including computers, hard  
12 drives, PDAs, cell phones, cell phone chargers and batteries, answering machines, and caller  
13 ID logs as well as Defendant's mountain bike, the clothes he claimed he was wearing on the  
14 bike ride, the clothes he was wearing at the time, and any GPS device in his vehicle.

15 **LEGAL ARGUMENT:**

16 *I. The affidavit contained sufficient facts for Judge Markham to make an*  
17 *independent judgment that there was probable cause for the searches.*

18 "[P]robability, not certainty, is the touchstone of reasonableness under the Fourth  
19 Amendment." *Hill v. California*, 401 U.S. 797, 804, 91 S.Ct. 1106, 111 (1971). "In order  
20 for a search warrant to be valid, it must be based on an affidavit containing sufficient facts to  
21 enable a magistrate to make an independent judgment as to whether there is probable cause  
22 for a search." *State v. Warren*, 121 Ariz. 306, 309, 589 P.2d 1338, 1341 (App. 1979). "A  
23 presumption exists in favor of the validity of the search warrant." *Id.*; see also *State v. Hadd*,  
24 127 Ariz. 270, 274, 619 P.2d 1047, 1051 (App. 1980); *State v. Kelly*, 99 Ariz. 136, 140, 407  
25  
26

1 P.2d 95, 97 (1965). "Doubtful or marginal affidavits should be considered in light of the  
2 presumption of validity accorded search warrants." *State v. Edwards*, 154 Ariz. 8, 12, 739  
3 P.2d 1325, 1329 (1986); *see also United States v. Ventresca*, 380 U.S. 102, 109, 85 S.Ct 741,  
4 476 (1965); *State v. Hyde*, 186 Ariz. 252, 272, 921 P.2d 655 675 (1996)(close cases should  
5 be resolved by giving preference to the validity of warrants.) "[A]fter-the-fact scrutiny by  
6 courts of the sufficiency of an affidavit should not take the form of *de novo* review." *State v.*  
7 *Crowley*, 202 Ariz. 80, 83, 41 P.3d 618, 621 (App. 2002) (quoting *Illinois v. Gates*, 462 U.S.  
8 213, 236, 103 S.Ct. 2317, 2331 (1983)). "A judicial finding of probable cause will be upheld  
9 if there was a substantial basis for the magistrate's finding." *Hadd* at 276, 619 P.2d 1047 at  
10 1053; *see also Edwards*, 154 Ariz. at 12, 739 P.2d at 1329.

11  
12 Defendant alleges that the Affidavit contains no information which links Carol's  
13 murder to the Alpine Meadow residence, his vehicle, or his office. This allegation ignores  
14 the facts as they were presented to Judge Markham. Defendant admitted he was in the area  
15 near Carol's home for at least 4 hours around the time of her murder. Charlotte claimed  
16 Defendant had been out of reach for as long as 6 hours. Defendant admitted that around the  
17 time of Carol's murder he was riding his mountain bike a short distance from Carol's home;  
18 however, no one can verify Defendant's exact whereabouts between 4:00 and 10:00 p.m. on  
19 the day of Carol's murder. Bike tire tracks were found on the land directly behind Carol's  
20 home. Defendant admitted that he had carried the bike in his car and that he had washed the  
21 clothes he was wearing on the bike ride immediately after he got home. Defendant admitted  
22 that he had left his home to go to his office after he returned home from the bike ride. These  
23 facts provide adequate probable cause to search Defendant's residence, car and office for any  
24 of the items listed in the Affidavit.  
25  
26

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1 The Affidavit specifically listed electronic storage devices including cell phones,  
2 digital media, cameras, video cameras, computers, hard drives, PDAs, answering machines,  
3 caller ID logs, and computer logs as items to be searched and/or seized. Defendant claims  
4 there is no probable cause to support the warrant's authorization for search and seize of the  
5 computers found in Defendant's home and office. Recognizing the electronic age in which  
6 we live, it was reasonable to conclude that communication between Defendant and the  
7 victim, along with documents related to the transfer of assets from Defendants 401K, would  
8 be stored electronically. A magistrate has authority "to draw such reasonable inferences as  
9 he will for the material supplied to him by applicants for a warrant." *Illinois v. Gates*, 462  
10 U.S. 213, 240, 103 S.Ct. 2317, 2333 (1983). "If it is reasonable to believe that a computer  
11 contains items enumerated in the warrant, officers may search it." *United States v. Giberson*,  
12 527 F.3d 882, 888 (9<sup>th</sup> Cir. 2008); *see also State v. Lavers*, 168 Ariz. 376, 385-86, 814 P.2d  
13 333, 342-43 (1991).

16 To the extent that the Affidavit lacked an express statement of the affiant's opinion  
17 regarding the existence of computerized records, this omission does not overcome the  
18 presumption of the warrant's validity. *State v. Edwards*, 154 Ariz. 8, 12, 739 P.2d 1325,  
19 1329 (1986); *see also United States v. Ventresca*, 380 U.S. 102, 109, 85 S.Ct 741, 476  
20 (1965); *State v. Hyde*, 186 Ariz. 252, 272, 921 P.2d 655 675 (1996). "Affidavits are to be  
21 interpreted in a commonsensical and realistic manner." *Edwards* at 12, 739 P.2d at 1329.  
22 "[P]robable cause is established by showing there is a 'fair possibility that contraband or  
23 evidence of a crime will be found in a particular place.'" *State v. Crowley*, 202 Ariz. 80, 86,  
24 41 P.3d 618, 624 (2002) (quoting *Gates* at 238, 103 S.Ct. at 2332). "Direct evidence that  
25 items sought will be found in a particular location is not required." *Untied State v. Poland*,

1 659 F.2d 884, 897 (9<sup>th</sup> Cir. 1981). The information in the Affidavit provided sufficient  
2 probable cause to authorize a search for computer records related to the murder of Carol  
3 Kennedy. Defendant's claim that the Affidavit lacked probable cause to support the search  
4 of his vehicle, the Alpine Meadow residence, his office, and his computers is clearly without  
5 merit and should be rejected.

6  
7 ***II. Defendant has failed to establish that any statement in the search warrant affidavit***  
8 ***was knowingly false or made with reckless disregard for the truth. His request for***  
9 ***a Franks Hearing should be denied.***

10 When a search is conducted pursuant to a search warrant, the search warrant is  
11 presumed lawful; the burden of proof is on the defendant to invalidate the search warrant.  
12 *State v. Hyde*, 186 Ariz. 252, 921 P.2d 655 (1996); Rule 16.2(b), *Arizona Rules of Criminal*  
13 *Procedure*. Generally, a magistrate's determination of probable cause is given great  
14 deference and reviewed under the "totality of the circumstances" standard. *State v. Edwards*,  
15 154 Ariz. 8, 12, 739 P.2d 1325 (App. 1987); *State v. Turner*, 142 Ariz. 138, 141, 688 P.2d  
16 1030 (1984).

17 Challenges to search warrant affidavits generally involve a two-step process. First,  
18 "[t]here must be allegation of ***deliberate falsehood*** or of ***reckless disregard for the truth***, and  
19 the allegations must be accompanied by an offer of proof." *Franks v. Delaware*, 438 U.S.  
20 154, 171, 98 S.Ct. 2674, 2685 (1978)(emphasis added). However, "***[a]llegations of***  
21 ***negligence or innocent mistake are insufficient.***" *Id.* (emphasis added); *State v. Carter*, 145  
22 Ariz. 101, 700 P.2d 488 (1985). Then, if the court finds that the affiant made a false material  
23 statement, the false statements must be necessary to the finding of probable cause. *Franks* at  
24 171, 98 S.Ct. 2674 at 2685; *State v. Spreitz*, 190 Ariz. 129, 145, 945 P.2d 1260, 1275 (1997);  
25 *State v. Buccini*, 167 Ariz. 550, 554, 810 P.2d 178, 182 (1991).  
26

1 Defendant claims the Affidavit contained knowingly false and misleading statements  
2 on two issues. One issue concerns an unmarked trailhead. Defendant gave the detectives  
3 directions to a location on Love Lane where he said he parked his car and then went on his  
4 bike ride. To the best of their abilities, the detectives followed Defendant's directions. They  
5 believed they were in the correct location and saw no evidence that Defendant's vehicle or  
6 any bicycle had been in the area. This information was included in the affidavit. Defendant  
7 offers no support that this information was either a deliberate misstatement or given with  
8 reckless disregard for the truth. As the United States Supreme Court determined in *Franks*,  
9 "[a]llegations of negligence or innocent mistake are insufficient" in showing an affidavit  
10 contains false or misleading statements.  
11

12 The second issue concerns statements made by Defendant's daughter. Charlotte  
13 DeMocker stated that Defendant had said he was going to the Hassayampa Trail and that  
14 since the divorce he did not go to the Williamson Valley area. It was not until after  
15 Defendant was identified as a suspect in this case that Charlotte changed her story and  
16 claimed this was an assumption on her part. It is evident that the Affidavit contained  
17 statements and facts that the affiant believed to be true. Defendant has failed to show the  
18 Affidavit included any deliberate falsehoods or that the statements were given with a reckless  
19 disregard for the truth. Lacking this showing, Defendant's request for a *Franks* Hearing  
20 should be denied.  
21

22 **CONCLUSION:**  
23

24 Defendant has failed to show that the Affidavit lacked probable cause for the search  
25 and/or seizure of the items enumerated within it. Likewise, Defendant had failed to show, by  
26 a preponderance of the evidence, that the Affidavit contained deliberate falsehoods or that the

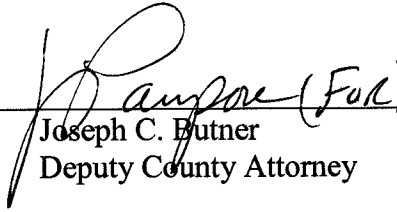


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1 statements were made with reckless disregard for the truth. Defendant Motion to Suppress  
2 Evidence and Request for *Franks* Hearing should be denied.

3 RESPECTFULLY SUBMITTED this 9<sup>th</sup> November, 2009.

4  
5 Sheila Sullivan Polk  
6 YAVAPAI COUNTY ATTORNEY

7  
8 By:   
9 Joseph C. Butner  
10 Deputy County Attorney

11 COPIES of the foregoing delivered this  
12 9<sup>th</sup> day of November, 2009 to:

13 Honorable Thomas J. Lindberg  
14 Division 6  
15 Yavapai County Superior Court  
(via email)

16 John Sears  
17 107 North Cortez Street, Suite 104  
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